RECORD NOS. 16-1132(L); 16-1173

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

For The District of Columbia Circuit

PRIME HEALTHCARE PARADISE VALLEY, LLC,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

ON APPEAL FROM NATIONAL LABOR RELATIONS BOARD

PAGE PROOF BRIEF OF PETITIONER/CROSS-RESPONDENT

Jason W. Kearnaghan
SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP
333 South Hope Street, 43rd Floor
Los Angeles, California 90071
(213) 620-1780

Counsel for Petitioner/Cross-Respondent

THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1, Petitioner and Cross-Respondent Prime Healthcare Paradise Valley, LLC, by and through its undersigned counsel, states that Prime Healthcare Services, Inc. is the sole owner and member of Prime Healthcare Paradise Valley, LLC.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28, Petitioner and Cross-Respondent Prime Healthcare Paradise Valley, LLC ("Prime") states the following:

1. Parties and *Amici*.

To date, the only parties to have appeared in the case are Petitioner and Cross-Respondent Prime and Respondent National Labor Relations Board ("the Board"). Counsel are not aware of any party that has sought to intervene or to participate as *amicus curiae*.

2. Ruling Under Review.

The ruling under review is the Board's Decision and Order in National Labor Relations Board Case Nos. 21-CA-133781, *et al.*, reported at 363 NLRB No. 169 (2016) and issued on or about April 22, 2016, and which is captioned *Prime Healthcare Paradise Valley, LLC and Richard Cardona and Stephene Ortega*.

3. Related Cases.

Prime is unaware of any related cases.

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CONSTITUTIONAL PROVISION

STATUTES

RULES

GLOSSARY

ALJ	Administrative Law Judge William Nelson Cates, who issued the May 8, 2015 decision in the underlying matter
The Board	Respondent National Labor Relations Board
FAA	The Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*
NLRA or The Act	The National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*
NLGA	The Norris–LaGuardia Act of 1932, 29 U.S.C. §§ 101 *et seq.*
Prime	Petitioner and Cross-Respondent Prime Healthcare Paradise Valley, LLC

JURISDICTIONAL STATEMENT

This consolidated review and enforcement proceeding addresses the Decision and Order issued by the Board on April 22, 2016 in Case Nos. 21—CA—133781 and 21—CA—133783. Prime timely filed its petition for review on April 28, 2016. The Board filed its cross-application for enforcement on June 7, 2016. The Board exercised jurisdiction over the proceedings below under Section 10(a) of the National Labor Relations Act. 29 U.S.C. § 160(a). This Court has jurisdiction over the petition for review and the cross-application for enforcement under Section 10(f) of the National Labor Relations Act because the Board's Decision and Order is a final order and Prime is a party aggrieved by the Decision and Order. 29 U.S.C. § 160(f).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Pursuant to Federal Rule of Appellate Procedure 28(a)(5), Prime submits that the following issues are before the Court for review:

1. Whether the Board erred in finding that Prime violated Section 8(a)(1) of the National Labor Relations Act by maintaining and seeking to enforce the class and collective action waiver in Prime's arbitration agreement.

2. Whether the Board erred in finding that Prime's arbitration agreement restricts employees' rights to file charges with the Board.

3. Whether the remedies ordered by the Board exceed the Board's authority and infringe on Prime's constitutional rights.

STATUTES AND REGULATIONS

Following is the text of the statutes primarily at issue in this appeal:

9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized insection 158(a)(3) of this title.

29 U.S.C. § 158(a)(1):

> It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

STATEMENT OF THE CASE

I. Cardona and Ortega Agreed To Submit Any And All Claims Arising From Their Employment To Individual Arbitration

This case arises from unfair labor practice charges filed by Stephene Ortega and Richard Cardona against Prime on or about July 29, 2014. (JX 1, 2.)[2] Prime operates a 291-bed acute care hospital located in National City, California. (PSF ¶ 3.) Prime employs approximately 1,200 people at the hospital in a variety of positions. (T 22:24-23:2.) Cardona worked for Prime as a Patient Account Registrar. (PSF ¶ 8; T 24:19-25:7.) Ortega works for Prime as a Respiratory Care Practitioner. (PSF ¶ 9(b).)

Since 2010, Prime has required all employees to enter into arbitration agreements as a condition of employment. (T 23:20-24:1.) Cardona signed an old version of the agreement that has not been in use since April of 2014. (PSF ¶¶ 7, 8; T 26:18-19.) Cardona's agreement provides, among other things, that "[Prime] and [Cardona] hereby consent to the resolution by binding arbitration of all claims or controversies for which a federal or state court would be authorized to grant relief, whether or not arising out of, relating to or associated with [Cardona's]

[2] References to the reporter's transcript of the hearing before the administrative law judge ("ALJ") on this matter are designated as "T [page and line number(s)];" the parties' Joint Exhibits at that proceeding are referred to as "JX [exhibit number];" the parties' Partial Stipulation of Facts will be referred to as "PSF ¶ [paragraph number(s)];" the ALJ's Decision will be referred to as "ALJD [page and line number(s)];" and the Board's Decision and Order as "Order, at [page number]."

employment with [Prime]." (JE 6.) Cardona's agreement is silent regarding class or collective actions. (*Id*.)

In April of 2014, Prime began requiring all of its employees, including Ortega, to sign a new arbitration agreement containing an express class/collective action waiver. (PSF ¶¶ 9(a)-(b); T 26:18-19.) Cardona did not sign the new agreement because he had resigned his position approximately one month earlier. (*See* T 24:19-25:7.) Prime revised its standard agreement after the U.S. Supreme Court held that class action waivers are fully enforceable in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) and *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

II. Despite Their Agreements To Arbitrate, Ortega And Cardona Filed A Proposed Class Action Lawsuit Against Prime

On April 14, 2014, Ortega filed a class action complaint against Prime in the San Diego County Superior Court. (JX 8.) The complaint alleged several claims under the California Labor Code as well as a derivative claim under California's unfair competition law. (*Id*.) Ortega sought to represent a class of "all individuals who are or previously were employed by [Prime] in California classified as non-exempt employees and paid in whole or in part on an hourly basis … at any time during the period beginning four (4) years prior to the filing of the Complaint and ending on the date determined by the Court." (*Id*. at ¶ 22.)

Ortega and Cardona later filed a First Amended Complaint in the action. (JX 9.) The amended complaint added Cardona as a named plaintiff and added other causes of action under the California Labor Code. (*Id*.) The proposed class definition was unchanged. (*Id*. at ¶ 24.)

Consistent with the arbitration agreements, Prime filed petitions to compel individual arbitration of the claims asserted in the lawsuit. (JX 10, 11.) Prime argued that (1) Ortega and Cardona signed valid arbitration agreements covering all employment-related claims against Prime, (2) the claims in the case were all employment-related, (3) Ortega's arbitration agreement expressly waived any right to pursue class litigation, and (4) Cardona's arbitration agreement contained an implied class action waiver. (*Id*.) Prime requested that the Superior Court dismiss all class claims, order Ortega and Cardona to arbitrate their individual claims, and stay the action pending completion of the arbitration. (*Id*.)

The Superior Court granted Prime's petitions. (JX 16, 17.) The Superior Court adopted Prime's legal theories and expressly found that the arbitration agreements contained valid class action waivers that were enforceable under California law. (*Id*.) The Superior Court struck the class claims, ordered Ortega and Cardona to submit their individual claims to arbitration, and stayed the lawsuit pending arbitration. (*Id*.)

III. The Unfair Labor Practice Charges And The Board's Decision And Order

Shortly after Prime filed its petitions to compel individual arbitration, Ortega and Cardona filed unfair labor practice charges with the Board claiming that Prime violated Section 8(a)(1) of the National Labor Relations Act ("NLRA"). (JX 1, 2.) Specifically, the charges alleged that Prime interfered with Ortega's and Cardona's right to engage in protected concerted activity by requiring them and other Prime employees to "forego any rights they have to the resolution of employment-related disputes by collective action, class action, or representative action." (*Id*.) Cardona's charge also alleged that Prime interfered with employees' access to the Board and its processes because Cardona's agreement could potentially be construed to prohibit the filing of unfair labor practice charges. (JX 1.) There was no similar allegation in Ortega's charge. (JX 2.)

On November 20, 2014, the Regional Director for Region 21 of the Board consolidated the cases and issued a complaint alleging that Prime violated Section 8(a)(1) of the NLRA by maintaining and requiring employees to enter into the arbitration agreements. (JX 4 at ¶¶ 4-7.) In addition, the complaint alleged that Prime violated Section 8(a)(1) of the NLRA by filing petitions in the Superior Court to enforce the arbitration agreements, despite the fact the underlying charges did not mention the petitions. (*Id*. at ¶ 6(c)-(f).) Finally, the complaint alleged that Cardona's agreement violated Section 8(a)(1) of the NLRA because it could be

read as precluding access to the Board. (*Id.* at ¶ 4(b).) There was no allegation that Ortega's agreement could be read this way. (*Id.*)

An ALJ conducted a hearing on February 23, 2013. (ALJD 1.) Prime's Manager of Human Resources, Lorraine Villegas, testified on behalf of Prime. (T 22:6-33:8.) Ortega and Cardona declined to testify, presumably to avoid cross examination. (*Id.*) Ms. Villegas testified that, among other things, employees clearly did not believe the old version of the arbitration agreement – the one Cardona signed – prevented them from filing administrative agency charges, as several employees who signed the old agreement filed administrative charges against Prime with agencies such as the Equal Employment Opportunity Commission and the California Department of Fair Employment and Housing. (*Id.* at 28:17-29:5.) Moreover, no employee ever complained or indicated in any way that he or she felt the old agreement precluded the filing of administrative agency charges. (*Id.* at 28:13-16.) Ms. Villegas' testimony was uncontroverted.

After the hearing, the ALJ issued a decision finding in Ortega's and Cardona's favor on every issue. (ALJD 12:35.) The ALJ found that Prime violated Section 8(a)(1) of the Act by (1) "maintaining and/or enforcing its mandatory arbitration agreements under which employees are compelled, as a condition of employment, to waive the right to maintain class or collective actions," and (2) maintaining a mandatory arbitration agreement that "employees

reasonably would believe bars them from filing charges with the … Board." (*Id*.) Prime filed exceptions to the ALJ's decision.

On April 22, 2016, a three-member Board panel, with one Board member dissenting in part, issued a Decision and Order affirming the ALJ's rulings. (Order, at 1-5.) The Board panel's order directs Prime to rescind or revise its arbitration agreement to "make clear" to employees that it does not "constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums." (*Id*. at 2.) The order also directs Prime to rescind or revise its old arbitration agreement to "make clear" that it does not prohibit employees from filing charges with the Board, even though it is undisputed that Prime has not been using the old agreement since at least 2014. (*Id*.) The panel majority further ordered Prime to reimburse Ortega and Cardona for the attorneys' fees and litigation expenses they incurred in opposing Prime's petitions to compel arbitration in the Superior Court action, despite the fact that Prime prevailed on the petitions. (*Id*.) Board Member Miscimarra dissented in part from the panel majority's decision and correctly concluded that Prime did not violate the NLRA by maintaining or enforcing the class action waiver in the arbitration agreements. (*Id*. at 3-4.)

SUMMARY OF ARGUMENT

This is one of numerous recent cases in which the Board has refused to observe U.S. Supreme Court precedent holding that class and collective action waivers in arbitration agreements are valid and enforceable. The Board's current stance that such provisions violate the NLRA originated in 2012 with the Board's decision in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), 2012 WL 36274, which was repudiated and overturned by the Fifth Circuit. The Fifth Circuit rejected the Board's position and expressly found that under controlling Supreme Court authority an employer does not violate the NLRA by requiring employees to enter into arbitration agreements containing class or collective action waivers. Indeed, the majority of circuit courts of appeals to consider the issue, including the Second, Fifth, Eighth, and Eleventh Circuits, have declined to follow the Board's rationale.

For several reasons, the Board erred in finding that Prime violated Section 8(a)(1) of the NLRA by maintaining and enforcing Ortega's and Cardona's arbitration agreements. The Board's decision directly conflicts with the FAA's mandate that arbitration agreements must be enforced according to their terms. This Court should decline to follow the Board's rationale because (1) the Board failed to respect the FAA and Supreme Court precedent holding that class action waivers in arbitration agreements are enforceable; (2) the Board's rule does not fit within the FAA's saving clause; (3) the NLRA does not contain a clear

congressional command to override the FAA; (4) Section 7 of the NLRA does not grant employees a substantive, non-waivable right to litigate on a class or collective action basis; and (5) the Board's decision rests on a flawed interpretation of another statute, the Norris-LaGuardia Act, that the Board does not have authority to enforce or interpret.

The Board also erred in finding that Prime violated Section 8(a)(1) of the Act by filing the petitions to compel arbitration. This finding, and the remedies ordered by the Board, violate Prime's First Amendment rights and exceed the Board's authority. Prime was not required to forego its successful legal defense in the California lawsuit initiated by Ortega and Cardona.

The Board also erred in finding that Prime's old arbitration agreement interferes with employees' rights to file unfair labor practice charges with the Board. The agreement does not contain any language prohibiting employees from filing unfair labor practice charges. Quite the opposite: the agreement specifically states in numerous places that it only applies to claims that would be asserted in court, and therefore makes crystal clear that it does not apply to administrative charges filed with an agency such as the NLRB. Moreover, the undisputed evidence shows that many employees who signed the agreement did, in fact, file administrative charges against Prime during the relevant time period. Those employees clearly did not believe they were precluded from doing so by the old

agreement. The Court should reject the Board's strained interpretation of the old agreement.

For these and the other reasons set forth in greater detail below, this Court should grant Prime's Petition for Review and deny the Board's Cross-Application for Enforcement.

STANDING

Prime has standing to bring this Petition for Review pursuant to 29 U.S.C. § 160(f), which states that any person aggrieved by a final order of the Board may obtain a review of such order. This Court has held that "standing to appeal an administrative order as a 'person aggrieved,' 29 U.S.C. § 160(f), arises if there is an adverse effect in fact, and does not . . . require an injury cognizable at law or equity." *Retail Clerks Union, etc. v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965). In this case, Prime is aggrieved by the Board's Order. The Order has an "adverse effect in fact" on Prime, as the Board ordered Prime to cease and desist from maintaining and/or enforcing employee arbitration agreements that Prime believes are lawful, to rescind or revise the arbitration agreements, and to inform its employees that it violated their rights under federal law. (Order, p. 2.) Prime thus has standing under *Retail Clerks Union*.

STANDARD OF REVIEW

This Court reviews the Board's findings of fact for substantial evidentiary support in the record as a whole. *See* 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-78 (1951). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, taking into consideration the record in its entirety including the body of evidence opposed to the Board's view." *Pac. Micronesia Corp. v. NLRB*, 219 F.3d 661, 665 (D.C. Cir. 2000) (citations and quotation marks omitted). Although Board decisions are given deference, enforcement is not presumed. Courts are not bound by Board conclusions that "go beyond what good sense permits." *Midwest Precision Heating and Cooling, Inc. v. NLRB*, 408 F.3d 450, 457 (8th Cir. 2005) (citing *Local Union No. 948, IBEW v. NLRB*, 697 F.2d 113, 117-18 (6th Cir. 1982)).

The Board's conclusions of law are reviewed de novo. *See Acme Die Casting v. NLRB*, 26 F.3d 162, 165 (D.C. Cir. 1994). When other federal statutory schemes are not implicated, the Court defers to the Board's interpretation of the NLRA "unless [it is] arbitrary or otherwise contrary to law." *Id.* However, even then, deference to the Board "cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption … of major policy decisions properly made

by Congress." *NLRB v. Fin. Inst. Employees of Am., Local 1182*, 475 U.S. 192, 202 (1986) (quoting *Am. Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965)).

Here, the Board's legal conclusions deserve no deference because the decision encroaches upon and contradicts other federal statutory schemes. The Court need not defer to the Board's interpretations of other federal statutes or Supreme Court precedent. *See, e.g., Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002). Indeed, the Board has no special expertise or competence in interpreting other federal statutes, including the Federal Arbitration Act ("FAA"). *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013).

ARGUMENT

I. Prime Did Not Violate The NLRA by Maintaining And Enforcing The Class Action Waivers In The Arbitration Agreements

Section 8(a)(1) of the NLRA provides, "It shall be an unfair labor practice for an employer … to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. § 158(a)(1). Section 7, in turn, states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities…." 29 U.S.C. § 157.

The express and implied class action waivers in Prime's arbitration agreements do not violate Section 8(a)(1) of the NLRA. In holding otherwise, the Board relied on its own decisions in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), 2012 WL 36274, which the Fifth Circuit reversed, and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), 2014 WL 5465454, which relied on the same logic the Board applied in *D. R. Horton* and which the Fifth Circuit also reversed. (Order, at 1.) Specifically, the Board contends that its prohibition against class action waivers in arbitration agreements does not conflict with the FAA because (1) mandatory arbitration agreements are unlawful under the FAA's saving clause because they extinguish rights guaranteed by Section 7 of the NLRA; (2) Section 7 amounts to a "contrary congressional command" overriding the FAA; (3) employees have a substantive right under Section 7 of the NLRA to access

class procedures; and (4) if a direct conflict exists between the NLRA and the FAA, the Norris La-Guardia Act mandates that the FAA yield to accommodate Section 7 rights. *See Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454, at *6-14. None of the Board's grounds are correct.

As discussed below, the Board's conclusion that class action waivers in arbitration agreements violate the NLRA is legally untenable under Supreme Court and related federal court precedent.

A. The Validity And Enforceability Of Prime's Arbitration Agreement Must Be Determined Under The FAA, And Not The NLRA

The enforceability and validity of the arbitration clause is governed by the FAA, and not the NLRA or the Board's decisions in *D. R. Horton* or *Murphy Oil*. While the Board has acknowledged it must "carefully accommodate" both statutes when a conflict exists between the policies of the NLRA and another federal statute, the Board's decision fails to give the required deference to the FAA. *See Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454, at *9.

The Supreme Court has clearly explained how the FAA and another federal statute are to be accommodated. The FAA requires that class action waivers in arbitration agreements be enforced according to their terms unless the NLRA contains a clear "congressional command" to override the FAA. *Italian Colors*,

133 S. Ct. at 2309 (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012)). The NLRA contains no such command.

Nevertheless, the Board has asserted that to the extent the FAA conflicts with the NLRA, "the FAA would have to yield." *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454, at *7; *D. R. Horton*, 357 NLRB 2277, 2012 WL 36274, at *16. This assertion conflicts with the Supreme Court's directive that under the FAA arbitration agreements must be enforced according to their terms in the absence a clear statutory command otherwise.

The broad, preemptive sweep of the FAA is undeniable. Section 2 of the FAA provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision requires courts to enforce arbitration agreements according to their terms. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

Congress designed the FAA to "reverse the long-standing judicial hostility to arbitration agreements … and to place arbitration agreements upon the same footing as with contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The FAA establishes a "liberal federal policy favoring arbitration agreements" and embodies the "fundamental principle that arbitration is a matter of contract." *Concepcion*, 131 S. Ct. at 1745 (quoting *Moses H. Cone Mem'l Hosp. v.*

Mercury Const. Corp., 460 U.S. 1, 24 (1983)). The FAA's overarching purpose is "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 131 S. Ct. at 1748.

Under the FAA, parties "may agree to limit the issues arbitrated," "may agree on rules under which an arbitration will proceed," and "may specify with whom they choose to arbitrate their disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010). The Supreme Court has made it abundantly clear that arbitration agreements must be enforced under the FAA "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator[.]" *Gilmer*, 500 U.S. at 32.

These principles, including the FAA's mandate that courts must rigorously enforce arbitration agreements according to their terms, apply equally when federal statutory rights are implicated. *Italian Colors*, 133 S. Ct. at 2308-09. The Supreme Court has expressly held that in such cases a class action waiver must be enforced according to its terms absent a "contrary congressional command" in the federal statute at issue. *Id*. Moreover, "even claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute serves its functions." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

The FAA's mandate applies equally to employment agreements, including those containing class action waivers. *See, e.g.*, *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 356-62 (5th Cir. 2013); *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776-77 (8th Cir. 2016). The FAA requires that arbitration clauses be enforced regardless of whether there may exist "unequal bargaining power between employers and employees" and even if the arbitration cannot go forward as a class action. *Gilmer*, 500 U.S. at 32-33.

This controlling authority makes it clear that the FAA governs and requires enforcement of the class and collective action waiver in Prime's arbitration agreements. The Board's position that the FAA yields to the NLRA with respect to the enforcement of class action waivers flies in the face of Supreme Court precedent interpreting the FAA. As discussed below, the NLRA lacks any congressional command to override the FAA.

B. The Board's Holding Directly Conflicts With The FAA

In finding that class action waivers in arbitration agreements violate the NLRA, the Board has purported to rely on two exceptions to the FAA's requirement that arbitration agreements must be enforced according to their terms: (1) an arbitration agreement may be invalidated on any ground that would invalidate a contract under the FAA's "saving clause," and (2) application of the FAA may be precluded by another statute's contrary congressional command. *See*

Murphy Oil USA, Inc., 361 NLRB No. 72, 2014 WL 5465454, at **11-14. Contrary to the Board's position, neither exception applies. Importantly, Board decisions are not entitled to any deference to the extent they purports to interpret the FAA and/or Supreme Court precedent in the area of arbitration. *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002) ("We are not obligated to defer to [the Board's] interpretation of Supreme Court precedent under *Chevron* or any other principle.").

1. The Board Cannot Use The FAA's Saving Clause To Prohibit Class Action Waivers In Arbitration Agreements

The FAA's saving clause does not support invalidating the class action waivers in Prime's arbitration agreements. The saving clause provides that arbitration agreements are to be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court has explained that the "saving clause permits arbitration agreements to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, ***but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue***." *Concepcion*, 131 S. Ct. at 1746 (internal quotations omitted, emphasis added). A rule that is neutral on its face but would nonetheless have a disproportionate impact on arbitration is **not** grounds for the "revocation of any contract" within the meaning of the saving clause. *Id*. at 1747.

The Supreme Court has made clear that a rule requiring classwide litigation is precisely the type of defense to which the FAA's saving clause does not apply. *See Concepcion*, 131 S. Ct. at 1746-52. In *Concepcion*, the Supreme Court held that the FAA's saving clause did not apply to a California rule prohibiting class action waivers in arbitration agreements because the rule "stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [in passing the FAA]." *Id*. at 1753. By effectively requiring the availability of classwide arbitration, the rule defeated the "fundamental attributes" of arbitration – informality, speediness, and efficiency – and "thus create[d] a scheme inconsistent with the FAA." *Id*. at 1748, 1751-52. For example, "before an arbitrator may decide the merits of a claim in classwide procedures, he must first decide … whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted." *Id*. at 1751. This "makes the process slower, more costly, and more likely to generate procedural morass." *Id*. Additionally, class arbitration does not offer the same procedural safeguards as litigation, such as appellate review. *Id*. at 1752. As the Supreme Court observed, "it [is] hard to believe that defendants would bet the company with no effective means of review." *Id*.

The reasoning in *Concepcion* applies equally to any purported NLRA rule precluding class action waivers in arbitration agreements. Such a rule would be no

less offensive to the FAA's goal of "promoting arbitration." *See Concepcion*, 131 S. Ct. at 1749. Just like the rule struck down in *Concepcion*, such a rule would require employers to participate in classwide arbitration and would, therefore, defeat the "prime objective of an agreement to arbitrate" – "streamlined proceedings and expeditious results." *Concepcion*, 131 S. Ct. at 1749.

The Board has attempted to distinguish *Concepcion* on the ground that its decisions do not require class arbitration and, instead, only requires the availability of class procedures in some forum. *See D. R. Horton*, 357 NLRB 2277, 2012 WL 36274, at *16. This argument has no merit. Under the Board's reasoning, employers would be forced to either allow class arbitration, which is contrary to the FAA, or forgo arbitration so an employee could invoke class procedures in court. Either way, like the rule nullified by *Concepcion*, the Board's decision "condition[s] the enforceability of certain arbitration agreements" on the availability of class procedures. *Concepcion*, 131 S. Ct. at 1744.

Importantly, consistent with *Concepcion*, the Fifth Circuit in *D. R. Horton* rejected the Board's assertion that its rule applies equally to arbitration and non-arbitration agreements and explained:

> While the Board's interpretation is facially neutral—requiring only that employees have access to collective procedures in an arbitral or judicial forum—the effect of this interpretation is to disfavor arbitration. As the *Concepcion* Court remarked, "faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual

> basis." It is no defense to say there would not be any class arbitration because employees could only seek class relief in court. Regardless of whether employees resorted to class procedures in an arbitral or in a judicial forum, employers would be discouraged from using individual arbitration.

D. R. Horton, 737 F.3d at 359 (internal citations omitted).

No matter how the Board frames the issue, "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA." *D. R. Horton*, 737 F.3d at 360. Because the Board's rule disfavors arbitration in practice, it does not fall within the FAA's saving clause.

2. The NLRA Does Not Contain A Congressional Command To Override the FAA

Nor does the NLRA contain a congressional command to override the FAA's mandate that courts rigorously enforce arbitration agreements according to their terms. Arbitration agreements involving federal statutory rights, including those containing class waivers, are enforceable "unless Congress itself has evinced an intention" to override the FAA by a clear, contrary congressional command. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). If such a command exists, it would "be discoverable in the text," the statute's "legislative history," or "an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Gilmer*, 500 U.S. at 26; *see also CompuCredit*, 132 S. Ct. at 672 ("When [Congress] has restricted the use of arbitration … it has done so with clarity."). The Board, as the party challenging an arbitration

agreement, has the burden to show that Congress intended to preclude the waiver of class or collective action procedures. *See Gilmer*, 500 U.S. at 26. When addressing whether a contrary congressional command exists, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26 (internal quotations omitted).

Here, there is no congressional command in the NLRA to override the FAA's mandate. Section 7 of the NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection." 29 U.S.C. § 157. The Board concedes that nothing in the NLRA's statutory text expressly creates a right to initiate class actions or provides for the override of arbitration agreements limiting the use of class procedures. *See Murphy Oil USA Inc.*, 361 NLRB No. 72, 2014 WL 5465454, at *13 ("To be sure, the NLRA does not explicitly override the FAA…."). Instead, in *Murphy Oil*, the Board concluded that the NLRA need not explicitly provide for a right to file a class or collective action in order to override the FAA because the right to engage in "concerted activity" is authorized by the broad language of Section 7 of the Act. *Id*. at *12. To support this contention, the Board relied on Section 10(a) of the NLRA, which provides that the Board's authority to prevent unfair labor practices

"shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." *Id*. (citing 29 U.S.C. § 160(a)). According to the Board, this language, taken together with Section 7's protection of "concerted activity," supplies a congressional command to invalidate an otherwise enforceable class action waiver. *Id*.

The Board's interpretation is incorrect for several reasons. Under Supreme Court jurisprudence, such general language in Section 7 and Section 10(a) of the NLRA is insufficient to show a statutory command to override the FAA. Even statutes that provide explicit procedures for class or collective actions will not override the FAA. For example, although the Age Discrimination in Employment Act and the Fair Labor Standards Act expressly provide for employee collective actions, the mere availability of these procedures in the statutes is insufficient to show a "command" to override the FAA. *Gilmer*, 500 U.S. at 32 ("[T]he fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."). As the Fifth Circuit has noted, "[i]n every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA." *D. R. Horton*, 737 F.3d at 357 n.8.

The Supreme Court's decision in *CompuCredit* shows the high threshold a party must meet to establish a "contrary congressional command." In

CompuCredit, the Supreme Court found that a provision of the Credit Repair Organizations Act, 15 U.S.C. § 1679f(a), which treats as void "any waiver by any consumer of any protection provided by or any right of the consumer," did not supply a "congressional command" to preclude arbitration agreements waiving the right to bring an action in court. *CompuCredit*, 132 S. Ct. at 670-71. In reaching this conclusion, the Supreme Court observed that when Congress "has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications in the CROA." *Id*. at 672. Statutory references to causes of action, filing in court, allowing suits, and pursuing class actions are insufficient commands to override the FAA. *Id*. at 670-71. The Supreme Court held that if such "commonplace" statutory provisions could perform the "heavy lifting" required to override the FAA, valid arbitration agreements encompassing federal causes of action would be rare, which "is not the law." *Id*.

More recently, in *Italian Colors*, the Supreme Court also found that antitrust laws do not contain a congressional command to override the FAA and preclude class action waivers. As the Supreme Court explained:

> The Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23, which was "designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." The parties here agreed to arbitrate

> pursuant to that "usual rule," and it would be remarkable for a court to erase that expectation.

Italian Colors, 133 S. Ct. at 2309 (internal citations omitted).

Clearly then, the NLRA does not contain the requisite clarity to supply a congressional command to override the FAA. Nothing in Section 7 or Section 10(a) of the NLRA mentions arbitration, class or collective action procedures, or class action waivers. Nothing remotely provides for the override of arbitration agreements limiting class or collective actions. If statutory language expressly providing for class mechanisms does not evince a congressional command, the NLRA's general references to "concerted activities" and "mutual aid or protection" certainly do not supply a sufficiently clear congressional command to override the FAA. The general statutory language on which the Board relies cannot perform the "heavy lifting" necessary to override the FAA. *See CompuCredit*, 132 S. Ct. at 670-71.

The legislative history of the NLRA also lacks any congressional command to override the FAA. The NLRA's primary "concern" is "the disruption to commerce that arises from interference with the organization and collective-bargaining rights of 'workers.'" *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 166 (1971). Thus, the legislative history of the NLRA does not discuss the right to file class, collective, or consolidated claims against employers or the use of any certain

procedural device to adjudicate claims arising under non-NLRA statutes. *See D. R. Horton*, 737 F.3d at 362. In fact, the NLRA "was enacted and reenacted prior to the advent in 1966 of modern class action practice." *Id.*; *see also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (noting that [Federal] Rule [of Civil Procedure] 23 "gained its current shape in an innovative 1966 revision"). As the Supreme Court reasoned in *Italian Colors*, the fact that the federal statutes at issue were enacted decades before the advent of Federal Rule of Civil Procedure 23 undermines the argument that the federal statutes contain a congressional command to reject the waiver of class arbitration. *See Italian Colors*, 133 S. Ct. at 2309.

In sum, the NLRA's text and legislative history do not contain any indication that Congress intended to override the FAA's mandate that arbitration agreements be enforced according to their terms. Had Congress meant for the NLRA to override the FAA, "it would have done so in a manner less obtuse" than what the Board suggests. *CompuCredit*, 132 S. Ct. at 667.

3. There Is No Inherent Conflict Between The NLRA And The FAA

A congressional command to override the FAA also cannot be inferred from an inherent conflict between the FAA and the NLRA's purpose. To the contrary, "arbitration has become a central pillar of Federal labor relations policy and in many different contexts the Board defers to the arbitration process both before and

after the arbitrator issues an award." *D. R. Horton*, 737 F.3d at 361. Indeed, the Supreme Court has understood the NLRA to permit and require arbitration. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257-58 (2009) (arbitration provision in collective-bargaining agreement must be honored unless ADEA removes such claims from NLRA's scope); *Blessing v. Freestone*, 520 U.S. 329, 343, 117 S. Ct. 1353 (1997) ("[W]e discern[] in the structure of the [NLRA] the very specific right of employees to complete the collective-bargaining process and agree to an arbitration clause.") (internal quotation marks and citations omitted).

"Having worked in tandem with arbitration agreements in the past, the NLRA has no inherent conflict with the FAA." *D. R. Horton*, 737 F.3d at 361. In an effort to distinguish these cases, the Board has asserted that there is a difference between collectively bargained arbitration provisions and mandatory individual arbitration agreements imposed by an employer. *See Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454, at *13. However, this distinction has been rejected by the Supreme Court. *14 Penn Plaza*, 556 U.S. at 258 ("Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.").

In any event, even if there were an irreconcilable conflict between the FAA and the NLRA, the FAA must control. Where statutes irreconcilably conflict, the statute later in time prevails. *See Chi. & N.W. Ry. Co. v. United Transp. Union*,

402 U.S. 570, 582 n.18 (1971). As the Eighth Circuit has acknowledged, the FAA was reenacted twelve years after the passage of the NLRA. *Owen*, 702 F.3d at 1053. Congress's decision to reenact the FAA, by itself, suggests that Congress intended the FAA's arbitration protections to remain intact even in light of the earlier enactment of the NLRA. *Id*.

For all of these reasons, the Court should reject the Board's attempt to manufacture an "inherent conflict" between the FAA and the NLRA. "[T]he Board has not been commissioned to effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942).

4. The Class Action Waivers Do Not Require Employees To Forgo "Substantive Rights"

In an attempt to reconcile its decisions with the FAA, the Board has asserted that class action waivers in arbitration agreements should not be enforced because such agreements require employees to forgo substantive rights in violation of *Gilmer*. *See D. R. Horton*, 357 NLRB 2277 (2012), 2012 WL 36274, at *12-13. However, the Board's analysis is fundamentally inconsistent with controlling Supreme Court precedent.

a. The Use Of Class Action Procedures Is Not A Substantive Right Under Section 7 Of The NLRA

The right to bring or participate in a class or collective action is not a substantive right. The Supreme Court has conclusively determined that class and collective action mechanisms are procedural devices, not substantive rights. *See Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ [Federal] Rule [of Civil Procedure] 23 is a procedural right only, ancillary to the litigation of substantive claims."); *see also D. R. Horton*, 737 F.3d at 357 ("The use of class action procedures … is not a substantive right" and "there are numerous decisions holding that there is no right to use class procedures under various employment-related statutory frameworks.") (citing *Gilmer*, 500 U.S. at 32).

The Board does not have the authority to create new statutory rights out of whole cloth, particularly where it flouts binding Supreme Court authority in doing so. The Court should reject the Board's characterization of a mere procedural rule as a Section 7 substantive right that overrides the FAA. *See Hoffman Plastic Compounds, Inc.*, 535 U.S. at 144 ("[W]e have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon … statutes and policies unrelated to the NLRA."). As discussed below, the Board's decisions cite no judicial or administrative precedent suggesting that the right to

class and collective action procedures in litigation or arbitration constitutes a substantive right under Section 7 of the NLRA.

b. The Decisions Cited By The Board Do Not Hold That Section 7 Grants A Substantive Right To Class Or Collective Action Procedures

Notwithstanding the above analysis, the Board has found that "[m]andatory arbitration agreements that bar employees from bringing joint, class, or collective workplace claims in any forum restrict the exercise of the substantive right to act concertedly for mutual aid or protection that is central to the National Labor Relations Act." *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454, at *6. However, while the NLRA may protect employees' right to act in concert generally, the authorities cited by the Board do not hold that employees have a non-waivable, substantive right to adjudicate claims through class or collective mechanisms.

For example, the Board has cited to the Supreme Court decision *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) as holding that the right to engage in collective legal action is a core right protected by the NLRA. *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454, at *12. However, the *Eastex* Court did not address whether filing a class action is protected or, more particular to this case, whether the NLRA prohibits an employer from contractually agreeing with employees that employment-related claims be arbitrated individually. The *Eastex* Court simply

noted that lower courts have interpreted the "mutual aid or protection" clause as protecting employees from retaliation when they seek to improve work conditions "through resort to administrative and judicial forums." *Eastex*, 437 U.S. at 565-66. The *Eastex* Court declined to address the bigger question "of what may constitute 'concerted' activities in this context." *Id*. at 566 n.15.

In fact, none of the decisions cited by the Board found a substantive right to invoke class procedures. Rather, those cases involved situations where an employer retaliated against employees by discharging or disciplining them for merely asserting legal rights collectively. *See Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183 (D.C. Cir. 2000) (employer discharged employee for filing court petition jointly with a co-worker); *Salt River Valley Water Users Ass'n*, 99 NLRB 849 (1952) (employee terminated for circulating petition prior to filing lawsuit); *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942) (employer discharged three union members for filing lawsuit); *see also Brady v. Nat'l Football League*, 644 F.3d 661 (8th Cir. 2011) (noting that filing lawsuit concerning terms and conditions of employment was protected activity). Consequently, these cases stand only for the unremarkable proposition that Section 7 protects employees from retaliation for joining together to assert their legal rights. However, these cases do not even remotely suggest that employees have a non-waivable, substantive right under the NLRA to use or invoke class and collective action procedures in

adjudicating claims in court or arbitration. Indeed, the cases cited by the Board made no reference to the procedures that might govern any non-NLRA employment claims.

c. Prime's Class Action Waivers Do Not Purport To Restrict Section 7 Rights

In addition, the Board has concluded that arbitration agreements waiving class and collective actions constitute agreements that "purport to restrict Section 7 rights." *See D. R. Horton*, 357 NLRB No. 184, 2012 WL 36274, at *5.

However, there is no authority supporting the Board's conclusion. Instead, the cases on which the Board relied in *D. R. Horton* and *Murphy Oil* involved "yellow-dog" contracts intended or used to impede well-recognized Section 7 rights, namely, active union organization. *See J.I. Case Co. v. NLRB*, 321 U.S. 332, 334 (1944) (company attempted to use individual contracts to "impede employees" from organizing); *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (company's contract with employee "not only waived employee's right to collective bargaining but his right to strike or otherwise protest on the failure to obtain redress through arbitration"); *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 360-61 (1940) (company required employees to sign contract relinquishing the right to strike and the right to demand a closed shop or a signed agreement with any union).

None of these cases are comparable to Prime's arbitration agreements requiring employees to individually arbitrate employment disputes. There was no basis for the Board to conclude from these cases that individual non-union agreements that merely waive a procedural litigation device are akin to contracts prohibiting union activity. Consequently, without any foundation, the Board's decisions impermissibly misinterpret controlling authority to expand the NLRA to guarantee procedural rights that clearly do not exist under the Act.

5. The Norris–LaGuardia Act Does Not Apply To Prime's Arbitration Agreements

The Board has also asserted that the Norris–LaGuardia Act ("NLGA") repealed the FAA to the extent the FAA compels courts to enforce mandatory individual arbitration agreements. *D. R. Horton*, 357 NLRB No. 184, 2012 WL 36274, at *16. According to the Board, in the event of a conflict between the NLGA and the FAA, the NLGA would prevail because it was enacted seven years after the FAA and expressly repeals all conflicting acts. *Id*. The Board's interpretation of the NLGA as prohibiting class action waivers is patently wrong. *See D. R. Horton*, 737 F.3d at 362 ("It is undisputed that the NLGA is outside the Board's interpretive ambit."). The NLGA is an anti-injunction statute that restricts the power of federal courts to issue injunctions against nonviolent labor disputes. 29 U.S.C. § 101. The NLGA also provides that yellow-dog contracts, where workers agree as a condition of employment "not to join, become, or remain a

member of any labor organization," are unenforceable in federal court. 29 U.S.C. § 103(a), (b).

The NLGA clearly does not apply here because this case did not involve an injunction proceeding and Prime's arbitration agreements do not prohibit employees from joining a union. Moreover, the Board's *D. R. Horton* and *Murphy Oil* decisions fail to cite a single case holding that an individual-specific arbitration agreement violates the NLGA. To the contrary, the NLGA "specifically defines those contracts to which it applies" and it is clear that an "agreement to arbitrate is not one of those contracts to which the [NLGA] applies." *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 844 (N.D. Cal. 2012) (citing 29 U.S.C. § 103(a), (b)); *see also Local 205, United Elec., Radio & Mach. Workers of Am. (UE) v. Gen. Elec. Co.*, 233 F.2d 85, 91 (1st Cir. 1956) ("[J]urisdiction to compel arbitration is not withdrawn by the Norris- LaGuardia Act.").

Furthermore, to the extent any tension exists between the NLGA and the FAA, there is no congressional command under which the FAA must yield to the NLGA. The FAA was reenacted fifteen years after the passage of the NLGA and, as noted above, twelve years after the NLRA. *See Owen*, 702 F.3d at 1053. As the Fifth Circuit explained in *Owen*, "[t]he decision to reenact the FAA suggests that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes [including the NLGA and the

NLRA]." *Id*. Thus, the NLRA and the NLGA provide no basis for concluding that the class action waiver in the arbitration agreement is unlawful.

Because Prime did not violate Section 8(a)(1) of the NLRA by maintaining and seeking to enforce the class action waivers in its arbitration agreements, the Court should grant Prime's Petition for Review and deny the Board's Cross-Application for Enforcement.

C. Following Supreme Court Precedent, The Majority Of Circuit Courts To Consider The Issue Have Rejected The Board's Position

In light of the FAA's goals and liberal policy favoring arbitration, numerous courts have refused to adopt the Board's position. Perhaps most saliently, the Fifth Circuit has expressly overturned the Board's holdings in *D. R. Horton* and *Murphy Oil* that an employer violates the NLRA when it requires, as a condition of employment, an arbitration agreement that waives an employee's access to class action procedures. *D. R. Horton*, 737 F.3d at 359; *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015).

In holding that the class action waiver in D. R. Horton's arbitration agreement did not violate the NLRA, the Fifth Circuit rejected the same central arguments the Board advances here. First, the Fifth Circuit found that filing class and collective actions is a procedural, not a substantive, right that can be waived. *Id*. at 357. Second, the Fifth Circuit rejected the Board's assertion that its rule falls

within the FAA's saving clause. *Id*. at 359. Relying on *Concepcion*, the Fifth Circuit concluded that the FAA's saving clause is inapplicable because the Board's interpretation of the NLRA disfavors arbitration. *Id*. at 359-60.

Next, the Fifth Circuit found no congressional command in the NLRA overriding the FAA. *Id*. at 359-61. The Fifth Circuit also held there is no inherent conflict between the NLRA and the FAA because "courts repeatedly have understood the NLRA to permit and require arbitration" and "[h]aving worked in tandem with arbitration agreements in the past, the NLRA has no inherent conflict with the FAA." *Id*. at 361-62. Accordingly, the Fifth Circuit held that the NLRA does not override the FAA's strong federal policy favoring the enforcement of arbitration agreements.

The Fifth Circuit's decision aligns with numerous other circuit courts of appeals and district courts that have either suggested or expressly stated that they did not agree with the Board's rationale. Consistent with the "more than two decades of pro-arbitration Supreme Court precedent," several circuit courts of appeals have refused to follow the Board's holdings that the NLRA prohibits arbitration agreements that waive access to class action procedures. *Owen*, 702 F.3d at 1054-55 (rejecting plaintiff's invitation "to follow the NLRB's rationale in *D. R. Horton*" and joining the "fellow circuits that have held that arbitration agreements containing class waivers are enforceable in claims brought under the

FLSA"); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334-36 (11th Cir. 2014), *cert. denied*, 134 S. Ct. 2886 (2014); *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (declining to follow *D. R. Horton* or grant the NLRB's decision any deference).

The overwhelming majority of the districts courts that have considered the issue have also declined to follow the Board's rulings in *D.R. Horton* and *Murphy Oil*. *See, e.g.*, *Owen*, 702 F.3d at 1054 n.3 (collecting district court cases); *Patterson v. Raymours Furniture Co., Inc.*, No. 14-CV-5882 VEC, 2015 WL 1433219, at *7 (S.D.N.Y. Mar. 27, 2015) (unpublished) (declining to follow *D. R. Horton* or *Murphy Oil* and noting "the NLRA does not stand in the way of the FAA's command to enforce arbitration agreements 'according to their terms'").

There is no legitimate basis to depart from the majority view that class action waivers in employment agreements do not implicate or violate the NLRA.

II. The Board Erred In Finding That Cardona's Arbitration Agreement Precludes Employees From Filing Unfair Labor Practice Charges With the Board

The Board further held that Cardona's arbitration agreement – but not Ortega's – violated Section 8(a)(1) because employees would "reasonably believe" it waived or limited their right to file Board charges or access the Board's processes. (Order, at 1 n.3.) However, the Board failed to identify any contractual language supporting its holding. (*Id*.) It is undisputed that Cardona's arbitration

agreement does not contain any language expressly prohibiting employees from filing unfair labor charges with the Board or otherwise accessing the Board's processes. (*See* JX 6.) Where, as here, an agreement does not refer to Section 7 activity, the Board should "not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule ***could*** be interpreted that way." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647, 2004 WL 2678632 (2004) (emphasis in original).

Moreover, when determining a rule's reasonable construction, "the Board must refrain from reading particular phrases in isolation and ***must not presume improper interference with employee rights***." *S.T.A.R., Inc.*, 347 NLRB 82, 83 n.3, 2006 WL 1496860 (2006) (emphasis added).

Here, Cardona's arbitration agreement, read in full, does not violate Section 8(a)(1). The agreement does not make any reference to agency or administrative proceedings. To the contrary, Cardona's agreement specifically provides that employees ***only*** "waive[] the right to have employment related disputes ***litigated in a court or by jury trial***." (JX 6 at ¶ 7 (emphasis added).) Moreover, the agreement states that it only applies to "claims or controversies ***for which a federal or state court would be authorized to grant relief***…." (*Id*. at ¶ 2 (emphasis added).) Finally, it also specifies that "[a]ll arbitrations covered by th[e] Agreement shall be

adjudicated in accordance with California and/or federal law ***which would be applied by a court of law***." (*Id*. at ¶ 4 (emphasis added).)

If interpreted fairly and reasonably, it is clear that Cardona's arbitration agreement only applies to claims that would be asserted in court ***in the first instance*** and, thus, does not apply to administrative charges filed with an agency such as the NLRB. The ALJ held the opposite, finding that employees "***could*** construe [Cardona's] [a]rbitration [a]greement as precluding them from filing charges with the Board" because "Board decisions are enforced by the United States courts of appeal[s]." (ALJD 8:25 (emphasis added).) But it does not matter whether an employee could potentially misconstrue the agreement in the manner suggested by the ALJ. The test is whether a ***reasonable*** employee ***would*** interpret the agreement this way. *Lutheran Heritage Village-Livonia*, 343 NLRB at 647.

A reasonable employee clearly would not. As the ALJ noted, "[t]he Board does not assume employees have specialized knowledge which could be employed in understanding [arbitration] clauses…." (ALJD 8:40 (citing *2 Sisters Food Group*, 357 NLRB 1816, 2011 WL 7052272 (2011)).) As such, contrary to the ALJ's findings, knowledge of the complicated appellate procedures applicable to NLRB proceedings cannot and should not be imputed to employees. A layman employee would not know that Board charges can be appealed to the U.S. Courts of Appeals, and it was error for the ALJ to presume as much. Rather, a reasonable

employee reading Cardona's arbitration agreement would conclude only that it applies to claims that would otherwise be filed in a trial court. This is particularly true in light of the fact the agreement specifically references "jury trial." (JX 6 at ¶ 7.)

It is significant that a number of employees subject to the same arbitration agreement as Cardona did, in fact, file administrative charges with state and federal agencies such as the Equal Employment Opportunity Commission and the California Department of Fair Employment and Housing. (T 28:17-29:5.) While the ALJ glossed over this fact (*see* ALJD 9:5), it is the only evidence in the record of how actual employees interpreted the arbitration agreement. These employees are presumptively reasonable, and they obviously did not believe the agreement prevented them from filing administrative charges. Moreover, no employee ever complained or indicated in any way that he or she felt the agreement precluded the filing of such a charge. (T 28:13-16.) The fact that employees did not interpret the agreement to prohibit the filing of charges is "instructive." *See Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007).

Further, there is no evidence that Cardona himself believed he was precluded from filing a charge with the NLRB, and the fact that he actually did so directly belies any such notion. Notably, Cardona declined to testify at trial. Thus, Prime was precluded from testing him on this point.

There is also no evidence that Prime ever intended to limit anyone's right to file an administrative charge with the NLRB. In fact, the evidence is to the contrary. As Prime's Human Resources Manager testified, Prime has never sought to compel arbitration of such a charge, and has never done anything to discourage any employee from filing such a charge. (T 27:10-28:12.) This testimony is uncontroverted.

For all these reasons, the Court should reject the Board's strained interpretation of Cardona's arbitration agreement, grant Prime's Petition for Review, and decline to enforce the Board's Decision and Order to the extent it holds that Prime violated the NLRA because Cardona's arbitration agreement can be interpreted to preclude access to the Board.

III. Prime Had A Constitutional Right To File The Petitions To Compel Arbitration

The Board's finding that Prime committed an unfair labor practice merely by filing the petitions to compel arbitration should be rejected for another separate and independent reason: Prime had a constitutional right to file the petitions under the First Amendment.

The right of access to the courts is an aspect of the First Amendment right to petition. *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983). The Supreme Court explained in *Bill Johnson's* that this First Amendment protection is only lost if the litigation both (1) lacked any reasonable basis and (2) was

retaliatory. *Id*. at 747. Additionally, there is an exception to this rule allowing the NLRB to issue remedies where an action is beyond a state court's jurisdiction because of federal preemption or "has an objective that is illegal under federal law." *Id*. at 737 n.5.

The general rule permitting sanctions for meritless, retaliatory litigation does not apply in this case. Prime filed its petitions to compel arbitration in the Superior Court action in response, and as a valid defense, to the lawsuit initiated by Ortega and Cardona, and not for any retaliatory purpose. Relying on California Supreme Court jurisprudence, the Superior Court found the class action waivers were enforceable and granted Prime's petitions. (JX 16.) Because Prime's petitions were granted, it cannot possibly be said that they lacked merit. Accordingly, the Court should reject any argument that Prime committed an unfair labor practice by filing its petitions to compel arbitration.

Further, the exception to the general rule is also inapplicable because there is no evidence that Prime had "an objective that is illegal under federal law." According to the Board in *Murphy Oil*, an "illegal objective" exists any time an employer seeks to enforce an agreement that violates the NLRA. *Murphy Oil*, 361 NLRB No. 72, 2014 WL 5465454, at *28. This cannot be the law. If it was, the general rule articulated in *Bill Johnson's* would be meaningless. Indeed, the Supreme Court recognized in *Bill Johnson's* that "if the employer's case in the

state court ultimately proves meritorious and he has judgment against the employees, the employer should also prevail before the Board, ***for the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice***." *Bill Johnson's*, 461 U.S. at 747 (emphasis added); *see also BE & K Const. Co. v. NLRB*, 536 U.S. 516, 537 (2002) (Scalia, J., concurring) ("[T]he implication of our decision today is that, in a future appropriate case, we will construe the [NLRA] … to prohibit only lawsuits that are both objectively baseless and subjectively intended to abuse process.").

Prime did not file its petitions to compel to further any "illegal objective." As discussed at length above, Prime's position in the state court lawsuit was entirely consistent with the FAA, Supreme Court precedent, and the holdings of numerous courts, including the California Supreme Court, finding that class actions waivers are enforceable in wage and hour lawsuits. The Board cannot preclude employers from filing meritorious petitions based solely on the hypothetical possibility that a court may later determine that the petitions in fact adversely affected Section 7 rights. Prime's petitions to compel do not fall outside the First Amendment's protection.

The actual remedies ordered by the Board are even more absurd. The Board ordered Prime to reimburse Ortega and Cardona for the attorneys' fees and expenses they incurred in opposing Prime's successful petitions to compel

arbitration. (Order, at 2.) This order exceeds the Board's authority because ***Prime prevailed on the petitions***. As dissenting Member Miscimarra explained in *Murphy Oil*:

> In other words, the majority orders the Respondent to pay the plaintiffs' attorneys' fees regarding an … issue as to which the plaintiffs lost, and as to which the Respondent prevailed…. There is not a hint in the [NLRA] or its legislative history that Congress intended to vest this type of remedial authority in the Board.

Murphy Oil, 361 NLRB No. 72, 2014 WL 5465454 (Member Philip A. Miscimarra, dissenting).

As demonstrated above, the Board has no authority to find that Prime committed an unfair labor practice by asserting its legal position that the class action waiver is valid and enforceable. Nor does the Board have the authority to order Prime to pay attorneys' fees and legal expenses incurred by Ortega and Cardona in litigating an issue on which they lost and Prime prevailed.

CONCLUSION

For the foregoing reasons, Prime respectfully requests this Court grant its Petition for Review and decline to enforce the Board's Decision and Order because Prime did not violate Section 8(a)(1) of the NLRA.

Dated: September 8, 2016

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By /s/ Jason W. Kearnaghan

Jason W. Kearnaghan, Bar No. 59804
Sheppard, Mullin, Richter & Hampton, LLP
333 South Hope Street, 43rd Floor
Los Angeles, California 90071-1422
Telephone: (213) 620-1780
jkearnaghan@sheppardmullin.com

Counsel for Petitioner and Cross-Respondent
Prime Healthcare Paradise Valley, LLC

CERTIFICATE OF COMPLIANCE

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Dated: September 8, 2016

/s/ Jason W. Kearnaghan
Counsel for Petitioner/Cross-Respondent

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 8th day of September, 2016, I caused this Page Proof Brief of Petitioner/Cross-Respondent to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Linda Dreeben
Jeffrey W. Burritt
Kira D. Vol
NATIONAL LABOR RELATIONS BOARD
Appellate and Supreme Court Litigation Branch
1015 Half Street, SE, Suite 8100
Washington, DC 20570
(202) 273-2960

Counsel for Respondent/Cross-Petitioner

I further certify that a copy of this Page Proof Brief of Petitioner/Cross-Respondent has been served, via U.S. Mail, postage prepaid, upon:

Nicholas J. De Blouw, Esq.
Blumenthal Nordrehaug & Bhowmik
2255 Calle Clara
San Diego, CA 92037

Counsel for Charging Parties
Richard Cardona and Stephene Ortega

/s/ Jason W. Kearnaghan
Counsel for Petitioner/Cross-Respondent